United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7493

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FOR THE SECOND CIRCUIT

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",

Third-Party Plaintiff-Appellant,

—against—

GTE INTERNATIONAL, INC.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Issue

Viewed most favorably to appellant in light of equitable considerations traditionally influencing maritime decisions, was there sufficient evidence of appellee's indemnity liability to require that the judgment for appellee notwithstanding the indemnity verdict for appellant be reversed?

Statement

The facts, contentions, trial course, and result are well summarized in Judge Griesa's unreported opinion (A17) granting the appealed (A25) judgment (A24) notwithstanding the verdict (A14).

Longshoreman DiGregorio sued appellant shipowner Nederland Steamship Co. for damages sustained when DiGregorio stepped through a cargo crate on Nederland's ship. After discontinuing his negligence claim for failure of proof (T520), DiGregorio received an unseaworthiness verdict and judgment for $50,000 against Nederland, which Nederland paid.

Nederland brought third-party indemnity proceedings against DiGregorio's employer, Universal Terminal & Stevedoring Corp. By special verdict, the jury found that Universal negligently breached its warranty of workmanlike service to Nederland because Universal actually or constructively knew the crate was defective, and should have taken necessary precautions. Universal moved for judgment n.o.v. on the ground of insufficient evidence of notice of the defect. Nederland did not oppose the motion, which was granted.

Nederland also brought third-party indemnity proceedings against the shipper of the crated cargo, appellee GTE International, Inc., and against the shipper's parent, General Telephone & Electronics Corp. Judge Griesa dismissed Nederland's claim against GTE's parent corporation. Nederland did not appeal the dismissal.

By special verdict, the jury found that shipper GTE's own negligence was a proximate cause of DiGregorio's accident (A15). As Judge Griesa noted (A20), if that finding is sustainable, Nederland is entitled to indemnity from GTE on authority of *Williamson* v. *Compania Anonima Venezolana de Navigacion,* 446 F.2d 1339 (2 Cir. 1971), cert. den. 404 U.S. 1059 (1972).*

* "While it may seem unfair to a shipowner that he be held responsible for a latent defect in a cargo container, he can recover over if he proves the shipper negligent", 446 F. 2d, p. 1342.

The jury also specially found that the negligence of Ainslie Antenna Company Ltd., which GTE's subsidiary Lenkurt Electric Co. of Canada, Ltd. hired to manufacture and crate the cargo, was a proximate cause of DiGregorio's accident (A15), thereby entitling Nederland to indemnity from GTE if Ainslie's negligence is imputable to GTE.

Judge Griesa granted GTE's motion for judgment n.o.v. on the grounds that, although there is ample evidence of Ainslie's negligence, such negligence cannot be imputed to GTE (A19-20), and although Nederland made multiple claims of GTE's own negligence (A20-21), there was insufficient evidence to support the claim that GTE negligently hired Ainslie, which is the only one of Nederland's multiple claims submitted to the jury (A21-22).

Nederland appealed the judgment for GTE notwithstanding the verdict for Nederland (A25).

Although there of course was some contrary evidence, construed most favorably to appellant there is sufficient evidence to support jury findings that:

While helping load (T11-12), DiGregorio stepped onto the previously stowed cargo crate shown in photographic Exhibits 1, 2, 3, 4 (T17, 23, 240), which broke underfoot (T13-14). Longshoremen customarily have to walk on stowed crates to stow others (T134-135, 265), and can expect the crates to be strong enough for such use (T363-364, 484-485). Before he stepped onto the crate which broke, the crate appeared to DiGregorio to be sound (T15), but after the accident fellow longshoremen saw that the material was thin and lacked interior bracing (T175-176, 185, 272).

Although not disclosed by the shipping documents (Nederland's Exhibit E and GTE's Exhibit D), with conse-

quent inequity to Nederland (T109-110), the crating was done by Ainslie, from whom GTE's subsidiary Lenkurt ordered on GTE's instructions 2 parabolic antennae with mounts, adjustments, and "export packing" (T105, 283, 390-391, 396, 402, 430), which Lenkurt assumed Ainslie knew meant crated in accordance with Canadian military specifications (T503-504), although GTE's manager did not know that (T443).

It was Lenkurt's function on GTE's behalf to be satisfied that Ainslie, which went out of business in 1971 (T401, 498, 500), was competent, but GTE's manager did not know whether Lenkurt performed that function (T401-402). GTE's manager never had any dealings with and knew nothing about Ainslie (T401, 404). Lenkurt's manager never saw Ainslie's plant and, other than by letter or long distance telephone, had only once or twice chatted for a few minutes with someone from Ainslie who happened to be visiting Lenkurt's plant (T510-511, 514). Lenkurt's manager said Ainslie had a good reputation and had filled previous orders without complaint (T499, 512), but Lenkurt's manager did not know how many of those orders were for antennae (T514-515), nor did he know whether Ainslie had a packaging department, manager, engineer, specifications, regulations, instructions, or how the ordered antennae were packaged (T509, 510, 512-513).

Although GTE, which has 34,478 employees (T379), is responsible for world-wide marketing and exportation of all products which General Telephone & Electronics Corp. and its subsidiaries ship from the United States, as well as

all products shipped by GTE from its own numerous foreign plants (T379-380), GTE has no export packaging manager (T381) nor does GTE have any export packaging department, engineer, specifications, or anyone in charge of packaging for ocean carriage (T381, 384, 385, 387). It is doubtful whether anyone at GTE is familiar with the manner in which break-bulk cargo, such as the crated antennae, is loaded aboard ship, or whether anyone at GTE ever bothered to find out (T404). GTE never inspected Ainslie's "export packing" (T388, 444) nor, indeed, did GTE ever see the shipment (T431-432, 444), which went directly from Ainslie to the loading dock (T429-430) by arrangements of a freight forwarder and services of a trucker, both hired by GTE (T447). GTE just receives and places orders, all paper work (T388-389, 407), in this case paying Ainslie $1,490 and charging the foreign buyer $2,280 (T440-441).

The crate through which DiGregorio stepped was made of ⅜ inch particle board (T324, 325), less expensive than wood (T325) and not customarily used to package shipments for common carriage by land, sea, or air (T325-326). Particle board tends to sag under load and has low resistance to breakage (T326). The maximum static safe load of the 20 inch panel of ⅜ inch particle board through which DiGregorio stepped was 40 pounds (T333-334), and the crate was also inadequately reinforced (T327-329). GTE's and Lenkurt's managers were unfamiliar with particle board and do not know whether Ainslie ever used it before (T374, 508, 512-513).

After correctly charging Nederland's absolute, non-delegable, no-fault liability for an unseaworthy condition (A3), and mentioning Nederland's claims that GTE negligently failed to adequately instruct Ainslie to properly package

the antennae and to inspect the improperly crated antennae (A4-5), Judge Griesa charged that GTE had no duty to instruct or inspect if GTE had reason to believe Ainslie was competent (A6), to which Nederland excepted (A9). After discussing the contentions, including Nederland's that GTE had insufficient knowledge of Ainslie to warrant any assumption of Ainslie's competence (A6), Judge Griesa charged that unless Nederland proved "GTE had notice of some inability on the part of Ainslie to pack for export shipping", the verdict must be for GTE (A6-7), to which Nederland excepted (A9-10, 13), and went on to charge Nederland's claim of GTE's imputed liability for Ainslie's negligence (A7-8).

ARGUMENT

Sufficiency of GTE's own negligence.

As Judge Griesa noted (A20), if there is sufficient evidence of GTE's own negligence, then Nederland is entitled to indemnity on authority of *Williamson* v. *Compania Anonima Venezolana de Navigacion, supra.*

The Judge charged that Nederland must prove "GTE had notice of some inability on the part of Ainslie to pack for export shipping" (A6-7), to which Nederland excepted (A9-10, 13). Since GTE knew nothing about now defunct Ainslie (T404), the charge invited the jury to reward GTE for its deliberate ignorance, an impermissible standard of care for reasons explicated by the dissenters in *Simpson Timber Co.* v. *Parks*, 369 F. 2d 324, 331-336 (9 Cir. 1967), rev'd *per curiam* 388 U.S. 459 (1967), reh. den. 389 U.S. 909 (1967).

Without objection by GTE, the charge treated Lenkurt as GTE's agent. Although it was Lenkurt's function to determine Ainslie's competence (T401-402), Lenkurt's efforts and information were inadequate (T509-515), or at least a jury could so find, thereby entitling Nederland to recover because GTE by Lenkurt negligently failed to use reasonable care to hire a contractor to do work involving risk of harm if not skillfully and carefully done, *L.B. Foster Co.* v. *Hurnblad*, 418 F. 2d 727, 729 (9 Cir. 1969); *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*, 318 F. 2d 720, 725 (2 Cir. 1963), cert. den. 375 U.S. 942 (1963), the jury having concurrently found that Ainslie was negligent (A15).

Nederland also claimed (A4-5) that GTE negligently failed to instruct Ainslie by laconically ordering "export packing" (T430), and negligently omitted to inspect the crate (T388, 444) to ascertain whether it was reasonably safe for longshoremen to stow in the usual manner, a determination which GTE was negligently incapable of making because of unfamiliarity with particle board (T374) and the manner in which longshoremen customarily have to work (T404).

Judge Griesa charged that "if GTE had reason to believe that Ainslie was competent and capable of doing proper and safe packing for the type of export shipment that went on here, and had no notice that Ainslie would fail to do such packing, then GTE was under no requirement to give further instructions to Ainslie or to supervise Ainslie or instruct Ainslie's packing" (A6), to which Nederland excepted (A9). The Judge rationalized the charge by analogy to "somebody [ordering] goods from people like Western Electric or Ainslie or U.S. Steel or Bloomingdale's or

Macy's, or a host of other entities and have them sent as gifts or to fulfill business commitments; and our whole system of doing business of that kind depends on people being able to order and have things sent, and it is so usual and I would be, I think, completely out of line to suddenly announce a rule or imply a ruling in a jury instruction that required a customer of this kind to go and supervise the packing. Secondly, if you are ordering heavy equipment like eight-foot diameter antennas, if the company is good enough to make them, I think there is almost a presumption that they are good enough to make a box to put them in" (A12). There are a couple of quick answers: The "customer" in the analogy is not the shipper, as GTE concededly was (T105), and the jury found that Ainslie wasn't "good enough" to make the crate.

In his opinion, Judge Griesa converted his analogy to a rule that: "A buyer normally has no duty under the law to supervise the seller in the process of producing or packing purchased goods" (A21). But if, as here, the buyer is a middleman seller of goods, the buyer is liable to ultimate users for defects, and a package is as much a product as its contents. *Simpson Timber Co.* v. *Parks, supra,* 369 F. 2d, p. 333, fn. 7. The charge that GTE could not be held liable for inadequately instructing Ainslie, or for not inspecting the crate, slighted hornbook law, Prosser, *The Law of Torts,* pp. 632-634 (4th ed. 1971); Restatement (Second) of Torts §§ 396, 412, 413 (1965).

Imputing Ainslie's negligence to GTE.

As evinced by the paucity of Judge Griesa's citations, this is a novel question, there being no reported case law. Judge Griesa reasoned that COGSA § 4(3), 46 U.S.C. § 1304(3), prohibits imputation because Ainslie was not GTE's "agent" or "servant" (A19-20).

COGSA § 4(3) is the counterpart of Hague Rule IV 3, Knauth, *The American Law of Ocean Bills of Lading*, p. 53 (4th ed. 1953), both of which read:

> "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

Hague Rule IV 3 was initially proposed at the 1922 London Conference of the International Maritime Committee in the following form:

> "The shipper to the same extent as the carrier shall not be responsible for loss or damage sustained by the carrier or the ship from any of the causes particularized in the above section 2 under the headings (b), (c), (d), (e), (f), (g), (h), (j), (k), (p), and (q)." Bulletin #41, Maritime Law Committee of the International Law Ass'n (Oct. 26, 1922); Hearings on H.R. 11447, House Committee on Merchant Marine & Fisheries, 68th Cong., 2nd Sess., p. 36 (1925).

The alphabetic "headings" in the proposal are, except for inconsequential wordage, the same as COGSA § 4(2) (b), (c), (d), (e), (f), (g), (h), (j), (k), (p), (q) exemptions. Significantly omitted, *inter alia*, were Hague Rule IV 2

(i), (n), Knauth, *supra,* p. 53, identical to COGSA § 4(2) (i), (n), which read:

"(i) Act or omission of the shipper or owner of the goods, his agent or representative"

"(n) Insufficiency of packing"

After discussion, the 1922 London Conference deleted the specific alphabetic headings in favor of the present general language, "without the act, fault, or neglect of the shipper, his agents, or his servants", the Chairman assuring that the latter encompassed the former, Bulletin #57, International Maritime Committee Report of Proceedings at the London Conference, Oct. 9-11, 1922, pp. 457-458 (1923).

There is no reported Congressional discussion of COGSA § 4(3), but Judge Dimock held in *Serrano* v. *United States Lines Company,* 238 F. Supp. 383, 388 (S.D.N.Y. 1965), authoritatively cited in *Williamson* v. *Compania Anonima Venezolana de Navigacion, supra,* 446 F. 2d, pp. 1341-1342, that its purpose is to relieve the shipper of any implied warranty to the ocean carrier that the cargo is fit to carry, such as pertains to overland shipments, *Eastern Motor Express* v. *A. Maschmeijer, Jr., Inc.,* 247 F. 2d 826, 828 (2 Cir. 1957), cert. den. 355 U.S. 959 (1958).

The carrier's COGSA obligations to exercise due diligence to make the ship seaworthy, and to properly and carefully load, etc., are non-delegable. *Federazione Italiana Dei Cors. A.* v. *Mandask Compania De V.,* 388 F. 2d 434, 439 (2 Cir. 1968), cert. den. 393 U.S. 828 (1968); *Nichimen Co.* v. *M. V. Farland,* 462 F. 2d 319, 330 (2 Cir. 1972). Hence, the carrier's COGSA "agents or servants" include such otherwise independent contractors as shore carpenters and stevedores,

Luigi Serra, Inc. v. *S.S. Francesco C,* 1965 A.M.C. 2029, 2036-2037 (S.D.N.Y. 1965), aff'd 379 F. 2d 540, 541 (2 Cir. 1967); *Nichimen Co.* v. *M. V. Farland, supra,* 462 F. 2d, p. 330; *cf., The Muncaster Castle,* [1961] A.C. 807, 1961 A.M.C. 1357, 1364-1365, 1368, 1369, 1380, 1388, 1390 (1961), holding carrier liable under Hague Rules for negligence of carrier's "agent", a reputable repair yard, and elucidating the *statutory* explanation of why, as between carrier and shipper, an otherwise independent contractor is an "agent".

> "Where a word or phrase is used in different parts of the same statute, it will be presumed to have the same meaning throughout." *C.I.R.* v. *Ridgeway's Estate,* 291 F. 2d 257, 259 (9 Cir. 1961).

Just as "neglect of the agents or servants of the carrier" as used in COGSA § 4(2)(q) includes, as between carrier and shipper, the negligence of an independent contractor hired by the carrier, so too should "neglect of the shipper, his agents, or his servants" as used in the very next provision, COGSA § 4(3), include as between carrier Nederland and shipper GTE the negligence of Ainslie.

In sum, as *quid pro quo* for COGSA protection of ocean carriers against an insurer's liability, the carrier cannot delegate its statutory liability by hiring someone to stand in its shoes. And, as *quid pro quo* for COGSA protection of ocean shippers against a warrantor's liability for safety of cargo, including packaging, the shipper should not be permitted to slough its statutory liability by hiring an Ainslie.

As indicated during colloquy (T109-110), the equity of imputing Ainslie's jury-determined negligence to GTE is compelling. The shipping documents (Nederland's Exhibit

E and GTE's Exhibit D) did not alert Nederland to the fact that anyone other than GTE manufactured and packaged the cargo. Nederland never heard of Ainslie until mentioned by GTE's manager during a court-ordered deposition taken on the eve of trial. It would be unconscionably absurd if common carriers by water had to discover and pursue packagers of shippers' cargo, with likelihood that the packagers' situs and solvency are distant and doubtful. The carrier should be able to look to its customer, the shipper, and if the shipper chooses to hire someone to package, then the shipper is better able to take effective remedial action against the packager. *Cf.*, Restatement (Second) of Torts § 429 (1965).

Conclusion

The judgment for GTE notwithstanding the verdict for Nederland should be reversed, with direction to enter judgment of indemnity in favor of Nederland against GTE or, alternatively if unavoidable, a new trial of Nederland's indemnity claim against GTE.

November 3, 1975

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

James P. Sawicz, being duly sworn, deposes and says that he is a clerk in the office of Burlingham Underwood & Lord, attorneys for Third-Party Plaintiff-Appellant "Nederland" herein; that on the 3rd day of November, 1975, he served the within Appellant's Brief by mailing three copies thereof, securely enclosed in a postpaid wrapper, in the post-office box regularly maintained by the United States Government at 25 Broadway in the said County of New York, to each of the following:

Joseph Arthur Cohen
Alexander Ash Schwartz & Cohen
801 Second Avenue
New York, New York 10017

The address of each of the above is the address designated by each of them for that purpose upon preceding papers in this action, or the place where each then kept an office.

James P. Sawicz

Sworn to before me this
3rd day of Nov., 1975.

Geraldine J. McKenna